Kiu Su Sieng & Ors v Registrar of Lands and Surveys Kuching Division

HIGH COURT (KUCHING) — KCH-24–95/9 OF 2015
RHODZARIAH BUJANG J
11 JANUARY 2016

Land Law — Caveats — Removal of — Plaintiffs were owners of two pieces of land — Defendant lodged caveats on land for reason of ongoing police investigation involving said land — Whether non-disclosure of police report by defendant — Whether failure to exhibit police report fatal — Whether registrar need to provide grounds to enter caveat

This was an application by the plaintiffs to remove caveats lodged by the defendant against two pieces of land owned by the plaintiffs namely Lots 310 and 1204 situated in Kuching. The defendant had entered those caveats based on the official request made by a very senior police officer for the reason of an ongoing police investigation involving an offence of giving false evidence under s 191 of the Penal Code which involved nine parcels of land, two of which were the plaintiffs' land. The plaintiffs argued that they had never been called by the police to give their statements in that investigation and neither had they been charged with any offence pertaining to the said offence. The plaintiffs also questioned on the non-disclosure of the police report by the defendant. In reply, the defendant submitted that the police report was not furnished to them at the time when the request was made and what was given to them was a letter by the Head of Special Branch, now SAC Hj Mohamad Morshidi Mustapha stating their objection to the withdrawal of the caveat. Subsequently, it was discovered that the police report was actually annexed to the said letter but was not exhibited by the defendant.

Held, allowing the application:

(1) There was no evidence put forth in the defendant's opposition to this action to show how exactly the case under their investigation was tied to the two parcels of land which must, in turn be protected by the caveats. The police report although annexed to the letter of SAC Hj Mohd Morshidi Mustapha but it was not exhibited in the defendant's affidavit in reply. The said omission was fatal because without the basic details of the alleged crime, maintaining the caveats would not be a reasonable option for the court (see para 4).

(2) Principally and since the lodgment was an official act and as in this case, at the behest of another, to maintain the said caveat the registrar must

show that there were justiciable grounds upon which her discretion or quasi-judicial powers were being exercised. As in the exercise of any discretionary powers, it must be one which is reasonable and rational. When challenged, as in this case, it was imperative for the registrar to furnish the grounds for the exercise of that power in order for the court to determine if the decision was so, which the registrar had failed to do in this case (see para 7).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif-plaintif untuk memotong kaveat yang dimasukkan oleh defendan terhadap dua bidang tanah yang dimiliki oleh plaintif-plaintif iaitu Lot 310 dan 1204 yang terletak di Kuching. Defendan telah memasukkan kaveat tersebut berdasarkan permohonan rasmi yang dibuat oleh pegawai kanan polis atas sebab siasatan yang sedang berjalan melibatkan kesalahan memberi keterangan palsu di bawah s 191 Kanun Keseksaan yang melibatkan sembilan bidang tanah, dua daripadanya adalah tanah plaintif. Plaintif-plaintif berhujah bahawa mereka tidak pernah dipanggil oleh polis untuk memberi pernyataan mereka dalam siasatan tersebut dan juga mereka tidak dituduh dengan apa-apa kesalahan berkaitan kepada kesalahan tersebut. Plaintif-plaintif juga mempersoalkan ke atas laporan polis yang tidak dikemukakan oleh defendan. Dalam jawapan, defendan berhujah bahawa laporan polis tidak diberikan kepada mereka pada masa apabila permohonan dibuat dan apa yang diberikan kepada mereka adalah surat oleh Ketua Cawangan Khas, sekarang SAC Hj Mohamad Morshidi Mustapha menyatakan bantahan mereka kepada penarikan balik kaveat tersebut. Kemudiannya, ia didapati bahawa laporan polis sebenarnya dilampirkan kepada surat tersebut tetapi tidak diekshibitkan oleh defendan.

Diputuskan, membenarkan permohonan:

(1) Tidak terdapat keterangan yang dikemukakan dalam penentangan defendan kepada tindakan ini untuk menunjukkan bagaimana benar-benar kes di bawah siasatan mereka dihubungkan kepada dua bidang tanah tersebut yang mana mesti, sebaliknya dilindungi oleh kaveat-kaveat tersebut laporan polis walaupun dilampirkan kepada surat SAC Hj Mohd Morshidi Mustapha tetapi ia tidak diekshibitkan di dalam afidavit jawapan defendan. Ketinggalan tersebut adalah serius kerana tanpa butiran asas jenayah yang didakwa, mengekalkan kaveat-kaveat tersebut bukan menjadi opsyen munasabah untuk mahkamah (lihat perenggan 4).

(2) Terutamanya dan memandangkan kemasukan adalah tindakan rasmi dan seperti dalam kes ini, atas perintah satu lagi, untuk mengekalkan kaveat tersebut pendaftar mesti menunjukkan bahawa terdapat alasan berjustifikasi di mana budi bicaranya atau kuasa kuasi-kehakiman telah dilaksanakan. Seperti pelaksanaan apa-apa kuasa budi bicara, ia mesti

satu yang mana adalah munasabah dan rasional. Apabila ditentang, seperti dalam kes ini, adalah penting untuk pendaftar mengemukakan alasan bagi pelaksanaan kuasa untuk mahkamah menentukan jika keputusan adalah sedemikian, yang mana pendaftar telah gagal untuk berbuat dalam kes ini (lihat perenggan 7).]

Notes

For cases on removal of caveats, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2711–2720.

Cases referred to

Agrimal Project Sdn Bhd v Pendaftar Hakmilik, Pejabat Tanah dan Galian, Johor & Ors [1998] 5 MLJ 673; [1997] 4 AMR 3398, HC (distd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 2 CLJ 713, CA (refd)

Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44; [1976] 1 LNS 135, PC (folld)

Legislation referred to

Land Code (Cap 81) ss 173, 182
National Land Code ss 320, 323(1)
Penal Code s 191

Andy Tan Tung Sii (Andy & Assoc) for the plaintiffs.
Beatrice Minda (Legal Officer, State Attorney General's Chambers) for the defendant.

Rhodzariah Bujang J:

[1] The plaintiffs, a mother ('the first plaintiff') and her three children ('the second to fourth plaintiffs') have filed this action to remove caveats lodged by the Registrar of Lands and Surveys, Kuching Division ('the defendant') against two pieces of land owned by them — Lot 310, Section 55 Kuching Town Land District was jointly owned by the first, second and third plaintiffs and Lot 1204, Block 207 Kuching North Land District by the first, second, third and fourth plaintiffs. The defendant has entered those caveats based on the official request made in a letter dated 9 September 2014 by a very Senior Police Officer, SAC Dato Hj Ibrahim bin Zakaria, who was Head of Special Branch of the Police Department and addressed to the Director of Lands and Surveys. The reason for that request is stated in the said letter as an ongoing police investigation involving an offence of giving false evidence under s 191 of the Penal Code which involved nine parcels of land, two of which are the plaintiffs' land (see exh D1 to the registrar's affidavit in opposition affirmed on 15 October 2015).

[2] The first plaintiff in both her affidavit in support and affidavit in reply to the defendant's affidavit in opposition deposed that neither she nor her co-plaintiffs have ever been called by the police to give their statements in that investigation and neither have they been charged with any offence pertaining to the said offence. In her affidavit in reply, the first plaintiff also questioned the non-disclosure of the police report which she said was a 'deliberate suppression' showing bad faith by defendant. However, in her affidavit in reply the defendant said she was not furnished with the police report at the time when the request was made and what was given to them subsequently was a letter by the Head of Special Branch, now SAC Hj Mohamad Morshidi Mustapha dated *12 October 2015* stating their objection to the withdrawal of the caveat (see exh DR5 to her affidavit in opposition). What I in turn noted from that letter is that it annexes the police report Sekama/002745/14 dated 3 April 2014 but the defendant did not exhibit the said police report to her affidavit in reply. Instead the registrar in her affidavit in reply deposed at para 10 thereof that she has yet to receive the status of the investigation.

[3] I must say that I fully appreciate the frustration of the plaintiffs given that one year has lapsed since the lodgment of the caveats and nothing seems to be done. At first glance the strength of their case, based on the Privy Councils decision in the *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44; [1976] 1 LNS 135, a case cited by their counsel, Mr Andy Tan seems obvious for even for non-payment of tax the registrar was not empowered to maintain a caveat lodged at the behest of the Department of Inland Revenue (as the Inland Revenue Board was known then) who had commenced an action against the land owner to recover the tax due. In saying this I acknowledge that there is some difference in the wordings of s 320 of the Land Code considered by the Privy Council in the said case with that of s 182 of our Land Code and which for clarity I shall reproduce below:

> Section 320 of the National Land Code
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> Section 320 specifies the circumstances in which registrar's caveats may be entered:
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> 320(1) Subject to sub-section (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to- be necessary or desirable —
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> (a) for the prevention of fraud or improper dealing; or
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> (b) for protecting the interests of —
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> (i) the Federation or the State Authority, or
>
> (ii) any person who is in his opinion under the disability of minority, mental disorder or unsoundness of mind, or is shown to his satisfaction to be absent from the Federation; or
>
> (c) by reason of some error appearing to him to have been made in the register or issue of title to the land or any other instrument relating thereto.

(2) Knowledge by the Registrar of the fact that any land or interest therein has been acquired, or is to be held, by any person or body in a fiduciary capacity shall not of itself constitute a ground for entering a Registrar's caveat in respect of that land.

Section 182 of the Sarawak Land Code

182(1) The Registrar may enter caveats for the protection of any person who is under the disability of infancy or unsoundness of mind, or is absent from Sarawak, to prohibit the transfer or dealing with any estate or interest belonging or supposed to belong to any such person, or on behalf of the Government to secure the interests of the Government, or the enforcement of any charitable trust, or the interests of the public, or any class or section of the public, or of any public body, and also to prohibit the dealing with any land, estate or interest in any case in which it appears to him that an error has been made in any document of title, or for the prevention of fraud or improper dealing.

[4] However, despite the difference, both Land Codes allow the registrar to lodge the caveat 'for the prevention of fraud or improper dealing' and that appears to be the reason given by the police to the registrar here in this case before me in their written request for the lodgement of the caveats as mentioned earlier. I said 'appears' because regrettably there is no evidence put forth in the defendant's opposition to this action to show how exactly the case under their investigation is tied to the two parcels of land which must, in turn be protected by the caveats. The case of *Agrimal Project Sdn Bhd v Pendaftar Hakmilik, Pejabat Tanah dan Galian, Johor & Ors* [1998] 5 MLJ 673; [1997] 4 AMR 3398 cited by Ms Beatrice Minda for the registrar is distinguishable because the police in their letter to the *Pengarah* of the said department in that cited case actually provided the details supporting the reason for the application for the lodgement of the caveat ie that the landowner did not transfer the properties to the buyer who have paid the purchase price for the same. No such detail was made in this case before me and as I said earlier the police report although annexed to the letter of SAC Hj Mohd Morshidi Mustapha dated 12 October 2015, was not exhibited in the defendant's affidavit in reply. The said omission is, in my view fatal because without the basic details of the alleged crime, maintaining the caveats would not be a reasonable option open to me. In drawing that conclusion, I fully understand that perhaps non-disclosure of certain facts whilst police investigation is still pending may be warranted to ensure the success of it, such as or for instance to protect the safety or interests of individuals connected to the report but still all these must come in the form of concrete affidavit evidence and not merely guess work on my or anybody's part.

[5] In this regard, although it is not exactly on the point, it is perhaps opportune for me to now reproduce what the Privy Council said in the *Temenggong Securities*'s case of the registrar's function under the said provision:

Under these sections the registrar's functions in relation to registrar's caveats are not

exclusively ministerial as they are in relation to the other kinds of caveats. They require the exercise of a discretion that is quasi-judicial in its nature. The prohibitory consequences resulting from the entry of a registrar's caveat impose what may be very damaging restrictions upon the private rights of the proprietor of the land. The registrar is not entitled to impose them unless they appear to him to be necessary or desirable for one or more of those purposes which upon the true construction of the section are specified in paragraph (a) or (b) of s 320(1) or necessary or desirable to counteract such documentary error as is mentioned in paragraph (c).

[6] Lord Diplock, delivering the judgment of the Council, then continued and concluded as follows:

If the mere existence of an unsecured civil debt owed to the Federation entitles the registrar to restrain the debtor from dealing with land of which he is the registered proprietor it must also entitle him to impose a similar restraint upon a simple contract debtor of any private person who does not happen to be within Malaysia. Their Lordships are unable to accept that Parliament by its use of the expression 'interests' intended to empower the registrar to confer upon a limited and miscellaneous category of unsecured creditors preferential rights over the lands of their debtors which are not available to creditors in general and are of a kind which has hitherto been unknown to the law.

The characteristic which is common to the three categories of persons specified in sub-paragraph (ii) is that they are handicapped in their ability to search for themselves the entries in the register relating to land in which they are entitled to an interest or to learn of any threatened dealing with the land which might have the effect of overriding their interest and which accordingly would justify an application for a private caveat. So far as these three categories of persons are concerned, in Their Lordships' view the clear intention of Parliament in including paragraph (b) in s 320(1) was to enable the registrar of his own initiative to do for persons in any of these categories what could have done upon an application made by them for a private caveat; and to do no more than that. As a public servant appointed by the state, the registrar is an appropriate officer himself to do on behalf of the Federation and the state authority what in the case of private individuals he could be required to do by a formal application on their part for the entry of a private caveat. Their Lordships accordingly conclude that the interests which the registrar is empowered to protect under s 320(a)(b) are confined to interests in the land that are recognised by the Code as being either registrable or otherwise entitled to protection. An unsecured creditor of the proprietor of land has no such interest in the land.

[7] Guided by the quotation above, I am therefore forced to reiterate my earlier conclusion that there is simply no legal justification to maintain the caveats and I order the same to be removed but given that the registrar was merely acting at the request of the police, I do so with no order as to costs. Those by no means are my last words on this case. Mr Andy Tan has raised in his written submission the defining case of the Court of Appeal in *Luggage*

Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 2 CLJ 713 on removal of caveat. With respect to Mr Andy Tan, I am of the view that the legal principles outlined in the said case do not apply to a caveat lodged by the registrar but only to the removal of a private caveat lodged under s 323(1) of the National Land Code or its equivalent, ie s 173 of our Land Code and the corresponding provisions in the two statutes on its removal. The registrar's caveat is, in my view, in a league of its own. Principally and since the lodgement is an official act and as in this case, at the behest of another, to maintain the said caveat the registrar must show that there are justiciable grounds upon which his (or her in this case) discretion or quasi-judicial powers are being exercised. As in the exercise of any discretionary powers, it must be one which is reasonable and rational. When challenged, as in this case, it is imperative for the registrar to furnish the grounds for the exercise of that power in order for the court to determine if the decision was so and which as I said earlier, the registrar has failed to do in this case.

Application allowed.

Reported by Dzulqarnain Ab Fatar